In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-522

BEN J. ROGERS, ET AL., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 9-12) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1972, and a petition for rehearing was denied on August 14, 1972. The petition for a writ of certiorari was filed on September 29, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 709(e) of the Civil Rights Act of 1964, 42

U.S.C. 2000e-8(c), provided at the time this action was commenced:

> [E]very employer, employment agency, and labor organization subject to this title shall * * * (3) make such reports * * * as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder.* * *

Section 710(b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-9(b), provided at the time this action was commenced:

> [I]f any person required to comply with the provisions of section 709(c) or (d) fails or refuses to do so,* * * the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, have jurisdiction to issue to such person an order requiring him to comply with the provisions of section 709(c) or (d) * * *.

The Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103, amended the Civil Rights Act by incorporating the substance of former Section 710(b) into a revised Section 709(c), which now provides in pertinent part:

> Every employer, employment agency, and labor organization subject to this title shall * * * (3) make such reports * * * as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for

the enforcement of this title or the regulations or orders thereunder.* * * If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission is empowered to sue to enforce the reporting requirements of Title VII of the Civil Rights Act of 1964.

STATEMENT

These consolidated actions were brought to compel compliance with the reporting requirements of Section 709(*c*) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-8(*c*).[1] as implemented by Commission regulations promulgated in 1966.[2] At the time this action was commenced, these reporting requirements were enforce-

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[1] While this action was pending on appeal, Congress amended Title VII of the Act through the Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103. The amendments made no relevant substantive changes in the reporting requirements. The texts of the former and the present Section 709(c) appear at pp. 2-3, *supra*.

[2] These regulations, which have no bearing on the issues here, are published at 29 C.F.R. 1602.7-1602.9.

able through Section 710(b) of the Act, 42 U.S.C. 2000e-9(b).[3]

The Commission's complaints alleged that petitioners had knowingly and deliberately refused to file the annual reports required by Section 709(c) and the Commission's regulations. The complaints sought orders compelling production of past and future reports, and an award of exemplary damages.[4]

On January 21, 1972, the district court granted petitioners' motion for summary judgment, on the ground that, since petitioners had submitted the past reports after the suit was filed, there was now no cause for injunctive relief and no basis for an award of damages.[5] The court of appeals vacated and remanded, holding that the Commission had authority "to seek judicial relief against an employer's willful noncompliance with the reporting provisions of Title VII" and that, in light of the record, "injunctive relief is mandatory unless the District Court finds on the basis of clear and convincing proof that there exists no reasonable probability of further noncompliance * * *" (Pet. App. A, pp. 10-11, 12).

ARGUMENT

Petitioners contend that the Commission has no authority to sue for injunctive relief when there has

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[3] The relevant portions of Section 710(b) have been transferred, essentially unchanged, to Section 709(c) by P.L. 92-261. The old and new provisions appear at pp. 2-3, *supra*.

[4] The Commission did not press its claim for exemplary damages on appeal.

[5] The court's unreported order is set forth in the Appendix to this brief, pp. 7-8, *infra*.

been willful disregard of the reporting requirements of Title VII. The decision below on this point, based on the express language of the Act, is clearly correct, and there is no reason for further review.

Section 710(b), prior to the 1972 amendments, explicitly empowered federal district courts "upon application of the Commission" to issue orders requiring persons to comply with the reporting provisions of Section 709(c). Section 705(h), 42 U.S.C. 2000e-4(g), authorized the Commission to appear in court through its own attorneys.[6]

Petitioners rely on *Equal Employment Opportunity Commission* v. *United Association of Journeymen and Apprentices,* 438 F. 2d 408 (C.A. 6), certiorari denied, 404 U.S. 832, and *Equal Employment Opportunity Commission* v. *Woolco Department Store,* 321 F. Supp. 811 (E.D. La.), vacated, 460 F. 2d 301 (C.A. 5). Both concern the substantive anti-discrimination provisions of Title VII, not its reporting obligations, and are thus plainly inapposite.

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[6] The 1972 amendments to Title VII renumbered Section 705(h) as 705(b)(2) and added a proviso that is not relevant here (86 Stat. 110).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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NOVEMBER 1972.

APPENDIX

DECREE

Having heard and considered the pleadings, motions to dismiss, motions for summary judgment, depositions and affidavits on file herein and the transcript of proceedings in Civil Action No. 6590, held in this Court July 10, 1970, together with the pre-trial order, conferences and stipulations herein and treating all of said motions as being for summary judgment, Rule 56, F.R.C.P., the Court finds:

1. Defendants, BEN J. ROGERS, SOL J. ROGERS, NATHAN JAY ROGERS and VICTOR J. ROGERS d/b/a Rogers Brothers, a partnership, and DR. N. JAY ROGERS and DR. S. J. ROGERS d/b/a Texas State Optical, are employers subject to Title VII of the Civil Rights Act of 1964;

2. The remainder of the defendants herein other than those named in Paragraph 1 above are not employers subject to Title VII of the Civil Rights Act of 1964;

3. After the filing of this suit defendants enumerated in Paragraph 1 hereof have filed the EEO-1 report forms sought by plaintiff herein and that said defendants had not filed such form, with the exception of the calendar year 1966, prior to the institution of this suit;

4. There exists no cause in law or fact to grant the Commission's prayer for injunction herein, and no useful purpose will be served the government, the

defendants, defendants' employees or others. Rather the granting of such injunction will unduly and unnecessarily burden the courts and parties; and

5. There is no basis for the award of damages in this matter.

IT IS ACCORDINGLY ORDERED that this cause shall be in all things dismissed at plaintiff's cost.

Done this 21 day of January, 1972.

/s/ William M. Steger
WILLIAM M. STEGER
United States District Judge

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